U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

Date: February 6, 2001

Case No.: **1998-ERA-37**

In the Matter of

MARK A. GRAF,
Complainant,

v.

WACKENHUT SERVICES L.L.C.,
Respondent.

Appearances:
John. P. Sheridan, Esq.
Dana L. Gold, Esq.
For Complainant

Dennis W. Brown, Esq.
Stacy A. Carpenter, Esq.
For Respondent

Before: JOHN M. VITTONE
Chief Administrative Law Judge

RECOMMENDED SUPPLEMENTAL DECISION AND ORDER AWARDING ATTORNEY FEES AND COSTS

This case arose under the Energy Reorganization Act of 1974 (the "ERA" or the "Act), as amended, 42 U.S.C. § 5851, and the regulations promulgated thereunder at 29 C.F.R. § 24. Section 5851(a) provides that an employee who engages in "whistleblowing" may not be discriminated against for his or her protected activity.

Background and History

On March 26, 1998, Mark A. Graf (the "Complainant") filed a complaint alleging that his employer, Wackenhut Services L.L.C. (the "Respondent"), had retaliated against him

for reporting safety violations at the Rocky Flats Environmental Technology Site, both in letters to Congressman Skaggs and in interviews with CBS news. The Occupational Safety and Health Administration of the Department of Labor investigated the claim and found merit. The Respondent appealed this finding on June 30, 1998.

[Page 2]

A formal hearing was held before Administrative Law Judge ("ALJ") Daniel L. Stewart during the week of April 5, 1999, in Denver, Colorado. Judge Stewart issued a 138 page *Recommended Decision and Order* on December 16, 1999. It was determined, after an extensive discussion of the evidence and applicable law, that Respondent had violated the whistleblower provisions of the ERA when it retaliated for Complainant's involvement with a CBS news investigative report. Judge Stewart rejected arguments that there had been retaliation for letters to Congressman Skaggs or reports to the Department of Energy. Reinstatement, cleansing of Mr. Graf's employment record, and a $5,000.00 compensatory damage award were recommended. Additionally, Judge Stewart provided for a filing of a petition for attorney fees and costs, as well as a response thereto. The deadlines for filing were extended several times. On June 23, 2000, the *Application for Attorney's Fees and Costs* was transferred to the Chief Administrative Law Judge for decision.

Discussion

The Energy Reorganization Act provides that if a violation of the whistleblower provision is found and an order issued, the complainant is entitled to reasonable costs and fees incurred in connection with the bringing of the complaint. 42 U.S.C. § 5851(b)(2)(B). Further, the lodestar method, which requires multiplying the number of hours reasonably expended by a reasonable hourly rate, is employed in calculating attorney fees in ERA cases. *Gaballa v. The Atlantic Group*, 1994-ERA-9 (Sec'y Dec. 7, 1995)(interim order).

Attorney Fees

GAP has requested the following attorney fees, including the hours detailed in the original application and the first and third supplements thereto. The second supplement did not include any attorney hours; it merely noted some additional expenses.

Name	Hours	Hourly Rate	Total
Carpenter	218.95	$250.00	$54,737.50
Sheridan	235.41	$250.00	$58,852.50
Gold	866.42	$175.00	$151,623.50
Locsin (Paralegal)	389.00	$75.00	$29,175.00

			$294,388.50

Hourly Rates

Here, Respondent has not objected to the hourly wages proposed by GAP; Messrs. Carpenter and Sheridan billed at $250.00 per hour, while Ms. Gold billed at $175.00 per hour. A paralegal billed at the rate of $75.00 per hour. These rates are based upon the prevailing rates in Seattle, Washington, where GAP's counsel are based. Normally, hourly rates are based on the locality of the hearing. There is evidence, however, which Respondent has not

---

controverted, that attempts to obtain counsel in Colorado failed because of the poor prospects for financial return. Moreover, GAP does have some expertise in whistleblower cases such as this which makes the organization well suited to represent Mr. Graf. Both the specialized nature of a case and the unavailability of local counsel are grounds for an exception to the general rule that the locale of the court sets the billing rates. *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988). I find that, under the circumstances of this matter, it is reasonable to apply the Seattle rates to these proceedings.

The rates identified ($250 per hour for Mr. Carpenter and Mr. Sheridan, $175 per hour for Ms. Gold, and $75 per hour for paralegal support), however, are high. GAP has introduced declarations from Seattle area attorneys attesting to the prevailing hourly rate for attorneys of the skill and experience levels of the GAP attorneys. However, I also note that the Altman Weil 2000 Survey of Law Firm Economics would place the rates for senior counsel in the upper quartile. The rates for Ms. Gold and the paralegal represent the average for the area. I therefore find that a reduction in the hourly rates for Messrs. Carpenter and Sheridan is warranted to reflect the Seattle average hourly rates. Both are entitled to an hourly rate of $220 per hour. This is less than the upper quartile rate of $250 per hour, but greater than the median rate of $205 per hour. It reflects the fact that while Mr. Sheridan's experience lies at the upper limit of the survey category (11 to 15 years), Mr. Carpenter's experience (13 years) is in the middle of that range.

Employer's Objections

Respondent's objections to the fee petition involved the reasonableness of many of the billing entries. Wackenhut argued that in light of the limited success enjoyed by the Complainant, much of the petition should be disallowed. Specifically, Respondent objected to vague block billing entries, inappropriate use of attorney time for administrative tasks, and billing for time spent which was not related to bringing or resolving the underlying complaint.

Specificity of Billing Entries

Respondent's objection encompasses two points. First, it is maintained that the block billing descriptions employed by GAP "fail to document how he or she utilized large blocks of time." *Case v. Unified School District No. 233*, 157 F.3d 1243 (10th Cir. 1998). As an example, Wackenhut refers to the January 14, 2000 billing entry of Ms. Dana Gold, wherein 4.5 hours were billed to seven different tasks without allocating specific times to each. Therefore, the reasonableness of the entry cannot be determined. I reject this argument. The billing entries do list multiple tasks in many instances, but all such entries also clearly note the related tasks. The cited example dealt entirely with small tasks related to the much larger task of filing the attorney fee petition, and included research, phone calls, drafting, and generating time records. I find that the cited entry clearly and specifically indicates that 4.5 hours were spent preparing the fee petition; all of the block billing entries for Ms. Gold are

---

similarly structured. The smaller tasks are clearly related to the larger task to which the block applies. I decline, therefore, to disallow any of her billed hours based upon a lack of sufficient allocation of time.

With regard to the billed hours for Messrs. Sheridan and Carpenter, however, the objection of Respondent possesses some validity. For example, a February 5, 1999 entry shows that Mr. Sheridan spent 7.5 hours "compiling exhibits for Response to Motion to Strike; draft[ing] declaration; finalizing and editing Response; draft[ing] attorney withdrawal from representation of Peters." While clearly most of this entry relates to the Response, the attorney withdrawal is a separate matter; the entry fails to show what portion of the 7.5 hours went to each of these main tasks. Entries of March 7 and March 19, 1999, show similar deficiencies. Mr. Carpenter's time entries likewise have block billing entries on unrelated smaller tasks. I find, therefore, that a portion of the block billing by Messers. Sheridan and Carpenter do not provide sufficient detailing of time allocation to establish the reasonableness of the time expenditures. Similarly, the billing for paralegal time has been presented monthly, without the daily breakdown provided in the attorney hours, and additionally makes use of the block billing practice without noting what hours were devoted to each task.

The second, related objection to the GAP fee petition involves a lack of specificity describing tasks. In support, Wackenhut cites the *Recommended Decision and Order on Attorney Fee Petitions* in *Varnadore v. Oak Ridge National Laboratory*, 1992-CAA-2, 1992-CAA-5, 1993-CAA-1 (Sept. 22, 1994). In that case, the ALJ determined that entries such as "review documents," "review & strategy," and "research & strategy" were too vague to permit meaningful review of the reasonableness of the entries. Respondent objects to entries such as "reviewing file," "reviewing legal research," "interrogatories," "strategy session," "deposition preparation," and "trial prep." While the entries utilized by GAP are more specific than those cited in *Varnadore*, *supra*, they are very much akin to the entries disallowed in *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257 (8th Cir. 1991). There, "legal research" and "trial prep" were too vague to permit meaningful review.

The petition, as Respondent noted, is replete with such entries. The time entries provided by Ms. Gold are fairly detailed, but the entries of Messrs. Sheridan and Carpenter leave much to be desired, both in the original application and in the supplements. I find that billing notations and descriptions such as "review documents," "depositions", "trial preparation," and "strategizing" do not provide a meaningful opportunity for review of the reasonableness or necessity of the fees charged.

Where the billing descriptions do not afford a meaningful opportunity to determine the reasonableness of the time expenditures, an ALJ need not engage in an item by item reduction of the hours. Such would be an impossible burden, and it is thus permissible to make reductions based upon a percentage basis. *Ecos v. Brinegan*, 671 F. Supp. 381 (M.D. N.C. 1987); *Varnadore*, *supra*. Therefore, as the block billing employed does not provide an adequate basis upon which to judge the reasonableness of all the time expended, I find it appropriate to reduce the hours of Ms. Locsin and Messrs. Carpenter and Sheridan by 15%.

[Page 5]

Media Related Entries

Mr. Carpenter has labeled 36.36 hours of his time expended as media-related entries. Time billed for contact with the media or, as in this case, updating a web page, may be reimbursed upon a showing that it is "directly and intimately related to the successful representation" of a complainant. *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992); *Berkman v. U.S. Coast Guard Academy*, 1997-CAA-2 & 9 (ARB Feb. 29, 2000). In *Davis*, publicity was used to sway the Board of Supervisors, whose approval of any settlement agreement was required. Here, there has been no showing that the media contact in any way furthered the Complainant's case. That the publicity drew attention to the problems complained of by Mr. Graf had nothing to do with GAP's successful representation. The case was tried before an independent fact finder, and no publicly elected entity's approval was required. The 36.36 hours for media representation are therefore deleted from the petition.

Third Party Subpoena

I decline to exclude hours related to Mr. Jeff Peters' subpoena. GAP represented Mr. Peters independent of Mr. Graf's complaint, and such hours would not be reasonably tied to these proceedings. However, it is clear that Mr. Peters was an issue in this hearing, and attempts by either party to include or exclude his evidence were certainly reasonably related to Mr. Graf's representation. I find that the other reductions I have made to the attorney hours adequately account for work which bore solely on Mr. Peters. Because of the importance of the evidence to Judge Stewart's *Recommended Decision and Order*, not all time related to Mr. Peters can be excluded.

The lodestar figure may now be calculated as follows:

Name	Hours[1]	Hourly Rate	Total
Carpenter	155.20	$220.00	$34,144.00
Sheridan	200.20	$220.00	$44,044.00
Gold	866.42	$175.00	$151,623.50
Locsin (Paralegal)	330.65	$75.00	$24,798.75
		Lodestar	$254,610.25

Adjustments to the Lodestar

Once the lodestar has been calculated by multiplying the hours reasonably expended by a reasonable hourly rate, the amount of attorney fees may be adjusted to account for various factors enumerated in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974). These factors, based upon the American Bar Association's Code of Professional

---

[Page 6]

Responsibility include: 1) time and labor required, 2) novelty and difficulty of the questions, 3) requisite skill, 4) preclusion of other employment because of accepting the case, 5)the customary fee, 6) whether the fee was fixed or contingent, 7) time limitations, 8) the amount involved and results obtained, 9) experience, reputation and ability of the attorneys, 10) the "undesirability" of the case., 11) the nature and length of the professional relationship with the client, and 12) awards in similar cases. *Hensley v. Eckerhart*, 461 U.S. 424 (1983), *citing Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 at 717-719 (5th Cir. 1974). *Hensley, supra*, also held that an applicant for attorney fees should exercise billing judgment. This means that "hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority." *Hensley v. Eckerhart*, 461 U.S. 424 (1983), *quoting Copeland v. Marshall*, 641 F.2d 880 (1980)(*en banc*).

The final factor, that of the amount involved and results obtained, is the most relevant of the twelve, and I find that upon consideration of the lodestar figure in light of such, a reduction is required. The Act contemplates an award of attorney fees for successful prosecution of a claim. The language of the ERA expressly authorizes an award of fees and costs only if merit is found on the complaint and an order issued to resolve such. There is no question here that the Complainant is a prevailing party under the Act. A violation of the whistleblower provisions was found, and Judge Stewart awarded Mr. Graf $5,000 in compensatory damages, as well as recommending appointment to a supervisory position and expungement of his records.

However, Complainant also argued for two other instances of retaliation in 1995 and 1996; Judge Stewart found that the employment actions following the protected activity in those instances were motivated by down-sizing. The Complainant actually prevailed in only a third of his case, and the $5,000 award is far below the over $400,000 which was sought. Clearly Complainant's success was limited. "A reduced fee award is appropriate if the relief [granted] is limited in comparison to the scope of the litigation as a whole." *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983). *Hensley* goes on to state that the extent of success is "a crucial factor" in establishing the proper amount of a fee award. I find, therefore, that a reduction in the lodestar figure is warranted to reflect the limited success of Complainant, and reduce the lodestar by 30%. This reflects the fact that although two of the three claims were found to be without merit, Complainant would still have had to introduce much of the evidence to support his successful claim; it is not reasonable to parse out the time spent pursuing each individual allegation, nor to identify each item with one separate allegation. The time and effort expended by GAP, therefore, was still reasonable and necessary.

[Page 7]

Billing Judgement

A statute which creates an exception to the application of the American Rule, under which parties bear their own litigation costs, is not a license for attorneys to present a bill for each and every minute expended on a case. "Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is obligated to exclude such hours.. ?Hours that are not properly billed to one's client also are not properly billed to one's adversary....'" *Hensley v. Eckerhart*, 461 U.S. 424 (1983) *quoting Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980)(*en banc*). In reviewing the attorney billing presented by GAP, I note numerous examples of charges which I find would not have been presented to a private client.

Ms. Gold billed numerous hours to transcribing tapes and packing boxes, as well as file organizing, scheduling, making travel reservations, and assembling billing records. GAP maintains that these activities were actually cost-saving measures, as having Ms. Gold perform them saved the cost of paralegal or staff hours and travel. I reject such an argument. It is improper to charge attorney billing rates for performing clerical functions, and such charges are disallowed. Mr. Carpenter billed a large number of hours for his attendance at trial, even though his participation at such was minimal. GAP argues that his time was spent preparing witnesses or in media related matters, and hence the "detailed time records...meaningfully" describing the time make it reasonable. However, Mr. Carpenter's records are not detailed, and Respondent has not denied that Mr. Carpenter attended the hearing. In fact, one entry is "observe trial." I find that at least part of the time billed for trial by Mr. Carpenter should have been excised through billing judgement, and hence a reduction of the lodestar is warranted. Mr. Sheridan billed for contact with GAP's Board of Directors. Clearly a private client would not have been

charged for such. Given all of these examples of a failure to exercise billing judgment, the lodestar figure is reduced by an additional 5%.

Total Fee

The lodestar figure was calculated above to be $254,610.25. The reduction to reflect the limited success is 30% of that amount, and the reduction to reflect proper application of billing judgment is an additional 5%, for a total 35% reduction. When these amounts are subtracted from the lodestar, the remaining amount of attorney fees awarded is $165,496.66.

Costs

GAP has submitted costs for a variety of categories, including postage, copies, travel, telephone, legal research, deposition costs, and supplies. These total $21,546.32. The Complainant also seeks reimbursement for various expenses, including copies, postage, travel costs, telephone charges, and meals. His expenses total ,823.66. The total reimbursement sought is $23,369.98. The ERA authorizes payment of costs related to the bringing of a successful complaint. 42 U.S.C. § 5851(b)(2)(B).

[Page 8]

One item can be immediately deleted; $89.00 was charged for the purchase of a spare laptop power supply[2] . GAP has acceded to the Respondent's objection, and this cost is disallowed.

Respondent's remaining objections to the itemized costs can be summarized in two categories. First, Wackenhut objects to travel costs for Mr. Carpenter, whose presence at trial is alleged to have been unnecessary. Second, Wackenhut objects to the remainder of the itemized costs as being too vaguely described to allow meaningful analysis. Because it cannot be determined if the charged costs were related to the bringing of the complaint or were reasonably and necessarily incurred, the costs should be disallowed.

I decline to disallow the travel expense for Mr. Carpenter. While his exact role at the trial is unclear, it was reasonable for him to attend. He apparently assisted with trial preparation and witnesses, even though the degree of his involvement is undetermined. I have already accounted for this by reducing the hours billed for his services, and a further reduction is unwarranted.

The Respondent's second objection is well taken with respect to several charges. The spreadsheet listing costs notes a charge of $34.47 under the category of "Other" for "Supplies" in April of 1999. The explanatory note says "REIMB./AL" with no explanation. I cannot determine from the bill or any accompanying documentation what this charge is for. Because the vagary of the description does not permit a determination on the reasonableness or necessity of the charge, it is disallowed. Likewise, a charge for

"1998 In-House Admin. Exps." appears directly below the "Other" charge. This cost is $444.14. There is no accompanying explanation for this cost, and it is therefore disallowed as well.

The remaining GAP expenses, totaling $21,067.71, are sufficiently described to meet the requirements of *Hensley*, *supra*. The deposition charges identify the reporter and the deponents; the travel charges have explanatory notes; and postage, copying, legal research, and telephone charges are self explanatory. Respondent would have these final cost categories broken down to show every instance of use, but such would be an undue burden. Because I find the expenses reasonable and necessary to the bringing of the complaint, they are allowed.

Mr. Graf's expenses also require some trimming. The issue of the laptop power supply was addressed above. Additionally, for the reasons already discussed, the expenses for copying, postage, and telephone calls are allowed. The majority of the Complainant's expenses involve meals and driving costs. He apparently picked his attorneys up at the airport in Denver in an attempt to reduce costs, and additionally paid for parking, gas and hotel rooms several times. There are also numerous meals taken with his attorneys.

[Page 9]

The parking expenses and mileage totals are allowed. However, I disallow the two charges for fuel totaling $8.65. Fuel costs are subsumed in mileage allowances, and I find that these free-standing expenses are redundant. The hotel room costs are allowable, as the attorneys traveled from Seattle and were required to be housed while in Colorado. With regard to the remaining charges for meals, I conclude that they are reasonable and related to the bringing of the complaint. The charges are certainly not excessive in amount, and it is reasonable to surmise that attorneys and clients will discuss case progress and strategy at meal times, especially in situations such as this, when the attorney's office is so far from the client's home and place of trial.

In sum, GAP costs in the amount of $21,067.71 and Graf expenses of ,726.01 shall be reimbursed.

Order

IT IS ORDERED that Respondent pay reasonable attorney fees and expenses incurred by Complainant in bringing a successful complaint under the whistleblower provisions of the ERA, totaling ,726.01 to Mr. Graf and $186,564.37 to the Government Accountability Project.

At Washington, DC

JOHN M. VITTONE
Chief Administrative Law Judge

[ENDNOTES]

[1]The hour figures include the time records submitted with the Fee Petition and in the First and Third Supplements. The Second Supplement contained only additional expenses.

[2]I note that GAP's Reply states Mr. Sheridan purchased the power supply, but that the cost is submitted as one of Mr. Graf's expenses.